

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**MARION O'BRYAN STRICKLAND**

**APPELLANT**

**VS.**

**NO. 2014-KA-01697**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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### **Statement of the Issues**

- Issue I: Whether the trial court erred when it allowed the State to present evidence that Strickland acted similarly in other instances involving male high school students.
- Issue II: Whether admission of testimony regarding the text messages that were sent by Strickland and received by the students violated the “best evidence rule.”
- Issue III: Whether Strickland’s counsel was ineffective for failing to raise an objection based on the “best evidence rule.”
- Issue IV: Whether the trial court erred when it declined to appoint a public defender to represent Strickland, when Strickland had retained counsel, and did not make the request until 19 days before trial.
- Issue V: Whether the State presented sufficient evidence to support Strickland’s conviction, and whether the jury’s verdict is against the overwhelming weight of the evidence.

### **Statement of the Case**

The Grand Jury of the Second Judicial District of Panola County indicted Marion O’Bryan Strickland for three counts of Exploitation of a Child: Enticing a Child to Produce a Visual Depiction of Sexually Explicit Conduct in violation of Mississippi Code Annotated § 97-5-33(7). (Indictment, CP 6). The State only proceeded against Strickland for one count, and after a trial by jury, Circuit Judge Smith Murphy, presiding, the jury found that he was guilty. (Verdict, CP 62). The trial court ordered Strickland to serve a sentence of forty years in the custody of the Mississippi Department of Corrections, with twenty years to serve, and twenty years of post release supervision. (CP 74-77). After denial of Strickland’s post-trial motions, this instant appeal was timely noticed. (Supplemental Volume 1).

### **Statement of the Facts**

During Marion O’Bryan Strickland’s first semester as a teacher at South Panola High School, he used a cell phone app to disguise his phone number, and posed as a female high school student

in order to convince a freshman male student to send him a picture of his genitals. (TR 306-312, 319, 326, 331-32, 341, 427-32, 446-47, 451-52, 455-56, 463, and 466).

The victim testified that he gave Strickland his number because Strickland had offered to set him up with a local female high school student. (TR 307). The victim sent text messages to a phone number that he thought belonged to a female; however, Strickland posed as the female and returned messages, himself. (TR 307-311, 319, 326, 329-30, 428-34, 450-51, and 455-56). Strickland admitted to sending the text messages, and admitted that he asked for a picture of the victim's front private area. (TR 455). However, Strickland claimed that the whole scenario was an attempt to counsel the victim because Strickland thought that the student might be homosexual. (TR 450).

The State presented evidence that Strickland had similar text-message-exchanges with other students; however, none of the other students sent nude photographs of themselves. (TR 346-49 and 381-83). The evidence showed that the contact with each student was initiated by Strickland, based on their particular interests. (TR 345, 379, and 381). One student testified that he exchanged numbers with Strickland because Strickland (who knew that the student had an interest in playing collegiate baseball) offered to get him in contact with a recruiter for a local community college, and another student exchanged numbers with Strickland because Strickland (who knew that the student had an interest in attending Ole Miss) had offered to set him up with a female student at Ole Miss. (TR 345 and 381-82).

In all of the text conversations, Strickland would pose as a female named "Jordan Smith." (TR 307, 346, and 382). He would send photos of "Jordan," and ask for photos in return. (TR 307-11, 346-47, and 383). The text messages with each student started as basic conversation, and then quickly escalated to a sexual nature. (TR 307, 346, and 383). Eventually, Strickland (posing as

Jordan) asked each student to send sexually explicit photos of themselves. (TR 309-11, 347, and 383).

### **Summary of the Argument**

The trial court did not abuse its discretion when it allowed the State to introduce evidence of Strickland's intent, plan, design, and scheme through testimony of other students whom Strickland contacted.

The trial court did not abuse its discretion when it admitted photos of text communications between two students and Strickland, and when it allowed the students to testify about the conversations that they had with Strickland, via text-message. The admission of this evidence did not violate the "best evidence rule," and Strickland's attorney was not ineffective for failing to object to the admission of this testimony, and Strickland was not denied the right to counsel of his choosing.

Finally, the State presented sufficient evidence to support Strickland's verdict, and the verdict is not against the overwhelming weight of the evidence. Because the issues raised by Strickland are without merit, his conviction and sentence should be affirmed.

### **Argument**

**Issue I: Whether the trial court erred when it allowed the State to present evidence that Strickland acted similarly in other instances involving male high school students.**

Strickland argues that he should be granted a new trial because he was prejudiced when testimony was admitted that showed that he had attempted to solicit sexually explicit photos from other students. (Appellant's Brief p. 10-11). He claims that this evidence was admitted because it was related to other acts of sexual misconduct, and that Rule 404(b) was applied differently, in his

case, because his case involved sexual abuse of children. (Appellant’s Brief p. 10). However, he seems to reject the contention that his misconduct amounted to sexual misconduct because “[n]o one has ever accused Strickland of inappropriately touching children, attempting to inappropriately touch children or luring children to him for the purpose of touching.” (Appellant’s Brief p. 10). Furthermore, he argues that the introduction of this testimony compromised his right to remain silent, because it forced him to testify in order to defend his character. (Appellant’s Brief p. 11).

Rule 404(b) provides that evidence of other acts is not admissible to prove the character of a defendant, or that he acted in conformity therewith. Miss. R. Ev. 404(b). However, the rule also provides that the evidence may be admissible if it is used for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* The rule regarding admissibility of prior-bad-acts evidence applies equally to cases involving sexually related offenses, and cases that are not related to sexual misconduct. *See S.C. v. State*, 795 So. 2d 526, 531 (Miss. 2001)(finding that evidence that a father had inappropriately touched his older daughter was admissible because it substantiated the fact that his younger daughter—who claimed that he also inappropriately touched her—was not mistaking a “good touch with a bad touch”), *Green v. State*, 89 So. 3d 543, 550 (Miss. 2012)(finding that evidence of similar sexual misconduct was admissible under Rule 404(b), because it supported an inference of a common plan, scheme, or system), *McDonald v. State*, 130 So. 3d 102, 111 (Miss. Ct. App. 2013)(finding that evidence of the defendant’s prior drug sales was admissible to establish his intent with respect to his pending intent-to-distribute charge).

Strickland relies on the Supreme Court’s decision in *Robinson v. State*, 35 So. 3d 501 (Miss. 2010), to support his argument that the admission of prior-bad-acts evidence, in his case, forced his

decision to testify. (Appellant’s Brief p. 11). In *Robinson*, and later in *Hargett v. State*, 62 So. 3d 950, 954 (Miss. 2011), the Supreme Court held that where prior-bad-acts evidence was admitted, without meeting an exception found in Rule 404(b), Robinson’s right to refrain from testifying, and Hargett’s right to a fair trial were compromised. See *Robinson*, 35 So. 3d at 507, and *Hargett*, 62 So. 3d at 954. However, *Robinson* and *Hargett* are distinguishable from the present case because the evidence at issue in Strickland’s case was used for reasons permissible under Rule 404(b).

Contrary to Strickland’s contentions, the State did not introduce evidence of his similar acts to show evidence of his character. In fact, the State introduced evidence of Strickland’s interactions and text-message-communications with other students that occurred closely in time to the interactions with the victim, not because the allegations against him were sexual in nature, but to show that Strickland had developed a common scheme, and that he prepared, planned, and acted with the goal of obtaining pictures of the children’s genitals.<sup>1</sup> The evidence also substantiated the victim’s testimony that the text conversation transpired and progressed in the manner that he claimed, because it showed that Strickland had acted similarly with other young males (even though those situations did not result in the children sending nude photographs of themselves). The evidence was presented for multiple acceptable reasons, under Rule 404(b), and the evidence was not more prejudicial than probative. Accordingly, the trial court did not abuse its discretion when it admitted the evidence, and this issue is without merit.

- Issue II: Whether admission of testimony regarding the text messages that were sent by Strickland and received by the students violated the “best evidence rule.”**
- Issue III: Whether Strickland’s counsel was ineffective for failing to raise an objection**

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<sup>1</sup>The jury was instructed that it could only consider the evidence for the limited purpose of establishing proof of motive, opportunity, identity, intent, plan, preparation, or knowledge. (CP 39).



based on the “best evidence rule.”<sup>2</sup>

Strickland argues that the “best evidence rule” was violated when students were permitted to testify about the text messages that were exchanged between themselves and Strickland, and photographs of phone screens (which showed some of the conversations) were admitted into evidence. (Appellant’s Brief p. 12). While he acknowledges that the argument was waived because it was not raised at trial, he invites this Court to find that the admission of this evidence amounted to plain error. (Appellant’s Brief p. 12). He also argues that his counsel rendered ineffective assistance because he did not raise objections based on the “best evidence rule.”

When reviewing the admissibility of evidence, this Court should review the trial court’s decision for an abuse of discretion. *Seals v. State*, 869 So. 2d 429, 433 (Miss. Ct. App. 2004). Absent an abuse of discretion, this Court should not reverse the trial court’s ruling. *Id.*

In order to prove that his counsel rendered constitutionally ineffective performance at trial, Strickland must prove (1) that his counsel was deficient, and (2) that the deficient performance prejudiced the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984). In other words, Strickland must prove that his counsel rendered constitutionally deficient representation when he failed to raise an objection based on the “best evidence rule,” then he must prove that the failure to do so prejudiced his case.

The evidence at issue did not violate the best evidence rule. Therefore, Strickland’s counsel was not deficient, and his claim of ineffective assistance of counsel must fail. Rule 1002 of the Mississippi Rules of Evidence provides that “[t]o prove the content of a writing recording, or

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<sup>2</sup>Because Strickland’s ineffective-assistance claim is dependent on this Court’s finding that the admission of evidence surrounding the conversations amounted to plain error, the issues will be argued together.

photograph, the original writing, recording, or photograph is required, except as otherwise provided by law.” Miss. R. Ev. 1002.

Strickland argues that the State did not introduce evidence that the text messages were not available. This claim is belied by the record. (TR 247-248, 318, 321-323, 334, 338, 350, 365, 437, 440-441, and 464-465). However, even if originals of the text messages were not available, testimony about their content and duplicates of the messages were still admissible.

The students’ testimony relating to the conversations that they had with Strickland, via text message, did not violate the best evidence rule. In *Quinn v. State*, 479 So. 2d 706, 709 (Miss. 1985), the Supreme Court found that proof of a conversation can be proven through a recording of the conversation or by testimony by witnesses who overheard it; that either type of evidence constitutes “best evidence;” that “both types of evidence are equally competent prior evidence, and that one is not to be excluded because of the existence of the other.” *Quinn*, 479 So. 2d at 709 (citation omitted). The Court also found that evidence of a conversation could be proven through testimony from a person who participated in the conversation and had first hand knowledge of the facts. *Id.* Accordingly, the Supreme Court found that an agent who participated in a controlled drug buy could testify about the conversation that occurred during the transaction, even though a poor-quality audio recording was available. *Id.*

The pictures that contained proof of some of the text messages were also admissible and did not violate the best evidence rule. Strickland argues that only the original text messages could be used to prove the content of the text messages. (Appellant’s Brief p. 13). Strickland’s argument is in conflict with Rule 1003. Based on Rule 1003 of the Mississippi Rules of Evidence, “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the

authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Miss. R. Evid. 1003. Strickland does not question the authenticity of the text messages, but argues that the State did not prove that the originals were unavailable. (Appellant’s Brief p. 13). He also does not claim that, under the circumstances, it was unfair to admit the duplicate instead of the original.

The best evidence rule was not violated in this case because a party to each of the conversations testified to prove that the conversation occurred; therefore, best evidence of the conversations was presented. Furthermore, even though the original text messages were not available, for various reasons, duplicates of some of the conversations were rightfully admitted because there was no genuine dispute as to their authenticity, and the circumstances did not render their admission unfair. Accordingly, there was no error, plain or otherwise, and Strickland’s attorney’s performance was not deficient for not raising an objection under the best evidence rule. Accordingly, both of these issues are without merit.

**Issue IV: Whether the trial court erred when it declined to appoint a public defender to represent Strickland, when Strickland had retained counsel, and did not make the request until 19 days before trial.**

Strickland’s attorney, Randolph Walker, filed a motion to withdraw as counsel 53 days before trial. (TR 15). Although he had represented Strickland in a civil matter against the school board and a habeas corpus matter relating to the bond set in the case at issue, and had represented Strickland in appeals in both of those cases, he explained that he wanted to withdraw because he and Strickland had “philosophical and tactical differences” relating to the trial of his criminal case. (TR 15 and 58). His attorney explained that Strickland *was cooperative with him*, but they had differences, and he felt that it would be in Strickland’s best interest to be represented by an attorney

who was more “in tune” with how Strickland wanted to handle his case. (TR 16)(emphasis added). Strickland explained that he and his attorney had “different perspectives on how to present [his] case,” and that he “[felt] like that for [his] best interest that [he] should have someone else to represent [him] so that he or she could possibly be able to see where [he was] coming from and defend [him] in the matter that [he felt fit him].” (TR 17).

The trial court found that, based on the fact that he had retained one attorney, Strickland obviously had the means and ability to hire a lawyer. (TR 17). And the trial court informed Strickland that, if he wanted a new lawyer, he would have to obtain one by his trial date: October 13. (TR 17). The trial court denied Walker’s request to be relived as counsel, and informed Strickland that, he could obtain new counsel so long as he did so by the date of trial. (TR 17-18). Strickland did not claim that he did not have the funds to hire an attorney until after Walker’s motion to withdraw was denied. (TR 18). Thereafter, he stated that he wanted a public defender to represent him. (TR 18). The trial court maintained its decision to deny Walker’s request to withdraw, informed Strickland that he was free to hire another attorney; otherwise, the trial court decided that Strickland should be represented by the attorney who had been working on his case for over a year. (TR 21).

Walker did represent Strickland at trial. (TR 58-61). And the trial court, recognizing the fact that Strickland was concerned with the way that his attorney planned to present his case, instructed defense counsel to confer with Strickland after he had finished questioning each witness. (TR 61-62). Defense counsel followed that directive and, on occasion, further questions were presented to witnesses, based on the conferences between defense counsel and Strickland. (TR 336, 367, 406, 485, 486, 494, and 543).

On appeal, Strickland claims that he was “denied counsel of his choosing,” and that the trial

court should have granted his request for new counsel because he and his retained counsel had an “uneasy relationship,” which he claims was evidenced by the fact that Strickland did not follow his attorney’s advice.<sup>3</sup> He claims that his request would not have amounted to a “last minute replacement of counsel” and that no continuance would have been necessary. (Appellant’s Brief p. 17).

This Court should not reverse the trial court’s decision to deny the motion to withdraw as counsel, because the trial court did not abuse its discretion. *See Feazell v. State*, 750 So. 2d 1286, 1287 (Miss. Ct. App. 2000). To determine whether a defendant has been denied counsel, this Court should consider “whether the accused has been protected, so far as counsel can do so, in all of his legal rights.” *Augustine v. State*, 28 So. 2d 243, 247-48 (Miss. 1946).

In *Taylor v. State*, 435 So. 2d 701, 703 (Miss. 1983), the Supreme Court affirmed a trial court’s finding that it was in the appellant’s best interest that his retained counsel continue his representation and not be permitted to withdraw as counsel. The Court reasoned that the attorney, Taylor, was completely familiar with the case because he had tried the case in the appellant’s first trial, and had successfully represented his client on appeal, which resulted in a reversal of his first conviction. *Id.* The Court noted that to warrant a substitution of counsel, “the defendant must show good cause, such as a conflict of interest[,] a complete breakdown of communication[,] or an irreconcilable conflict *which leads to an apparently unjust verdict.*” *Id.* (citation omitted)(emphasis in original). The Supreme Court found that the record showed that the appellant refused to cooperate with his attorney, refused to talk to him about his case, and forced his attorney to prepare for trial as he saw fit. *Id.* On appeal, the appellant’s main complaint was that his attorney did not subpoena

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<sup>3</sup>The only “advice” that Strickland did not follow, that is clear from the record, is the advice not to testify. (TR 551).

the witnesses he wanted him to; however, the Court noted that the suggested witnesses' testimony would not have been competent. *Id.* Ultimately, the Supreme Court held that the trial court did not abuse its discretion when it found that it was in the appellant's best interest for Taylor to represent him at trial. The Court found that if appellate courts were "forced to reverse a conviction when the accused suddenly decides to embark on a course of non-cooperation with his attorney. . .absurd results would occur" and "[a]ll an accused would have to do would be to 'fall out' with his appointed attorney immediately prior to or at trial and insist on a continuance for another attorney to prepare the case." *Id.* The Court expressed that it understood why an attorney would attempt to remove himself from the situation, but found that "the courts cannot permit an accused to take charge of his defense and abuse his constitutional privileges as was done by the appellant in [Taylor]." *Id.*

Strickland does not claim that he was not protected in all of his legal rights, he simply claims that he did not get along with his attorney, and did not follow his advice. (Appellant's Brief p. 17). This is not grounds for reversal. The record shows that Strickland was well represented, and that, to the best of his ability (and with assistance from the trial court), defense counsel attempted to ensure that Strickland was able to present his defense, in the way that he wanted to. This Court should hold, as the Supreme Court did in *Taylor*, that Strickland did not show good cause as to why his attorney should have been permitted to withdraw, and that the record actually shows that Strickland continued to communicate with his attorney, and that there was never any irreconcilable conflict that led to an unjust verdict. Therefore, the trial court did not abuse his discretion in denying the retained and knowledgeable defense attorney's request to withdraw as counsel, and this issue is without merit.

**Issue V: Whether the State presented sufficient evidence to support Strickland's conviction, and whether the jury's verdict is against the overwhelming weight of the evidence.**

Strickland argues that the evidence was insufficient to support his conviction, and claims that the photo that he received from the victim did not amount to “sexually explicit conduct.” (Appellant’s Brief p. 18-20). He also argues that the jury could not convict him without actually seeing the photo. (Appellant’s Brief p. 19-20).

This Court has already decided that the photograph amounts to sexually explicit conduct, in Strickland’s case. In 2014, Strickland filed an appeal and claimed that his bail and conditions of his bail were excessive, and amounted to a denial of bail. *See Strickland v. Darby*, 135 So. 3d 234 (Miss. Ct. App. 2014). This Court affirmed the circuit court’s finding that Strickland had been accused of serious crime, and that a serious bail was required. *Id.* at 237-38. In reaching its decision, this Court addressed the question of whether Strickland’s accused conduct amounted to sexually explicit conduct pursuant to Mississippi Code Annotated Section 97-5-33(7) and Mississippi Code Annotated Section 97-5-31(b)(v). *Id.* at 238. The Court noted that “it [was] undisputed that Strickland requested and received a picture of the child’s genitals after convincing the child that he would set him up with a female.” *Id.* The Court decided that, even though the child did not display his genitals to Strickland, in person, “the picture of the child’s genitals constitute[d] ‘sexually explicit conduct’ within the perimeters of 97-5-31(b)(v),” and found that the presumption was great that Strickland committed an offense under section 97-5-33(7). *Id.*

This Court’s decision in *Strickland v. Darby* is supported by the Supreme Court’s decision in *Hood v. State*, 17 So. 3d 548, 555-56 (Miss. 2009). In *Hood*, the Supreme Court found that the jury was entitled to convict the defendant for exploitation of children because he possessed videotapes that contained close-up images of the genitals of numerous young boys. *Id.* at 556. The

Court explained that, in order for the images to be found to contain “sexually explicit conduct,” the characteristics of the child photographed are not what is relevant. *Id.* (citing *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.1987)). Instead, the question is whether the images are designed to elicit a sexual response in the viewer. *Id.* at 556.

Subsequent to this Court’s decision in *Strickland v. Darby*, Strickland was tried and convicted for enticing a child to produce visual depiction of sexually explicit conduct. *See* Miss. Code Ann. §97-5-33. The State presented sufficient evidence to prove that Strickland’s conduct amounted to a violation of the statute. Strickland admitted that he asked for, and received, a photo of the victim’s genitals. And although Strickland presented a number of reasons as to why he asked each student for a picture of their genitals, the jury was entitled to conclude that those reasons were not credible. *See Waterman v. State*, 822 So. 2d 1030, 1033 (Miss. Ct. App. 2002). Furthermore, the jury was entitled to convict Strickland if it found that Strickland enticed or solicited the victim to produce and send him a visual depiction of sexually explicit conduct; therefore, if the jury found that Strickland asked for such a photo, the jury could find him guilty (even though the jury never saw the photo, themselves). (CP 42). Although the State only sought to prove that Strickland committed the crime against one student, the evidence relating to conversations with other students served to prove that Strickland’s actions toward the victim amounted to exploitation, that he sought sexually explicit photos from all of the students, and that he actually received such a photo from one of the students. The jury’s verdict is supported by sufficient evidence and is not against the overwhelming weight of the evidence. Accordingly this issue is without merit.



### **Conclusion**

The issues raised by Strickland are without merit. Accordingly, the State of Mississippi respectfully requests that this Honorable Court affirm his conviction and sentence.

Respectfully submitted,

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### **Certificate of Service**

I hereby certify that on this day I electronically filed (and mailed by United States Postal Service) the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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This the 23rd day of September, 2015.

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